

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NORTHEASTERN DIVISION**

B. A. P., a minor child by and through her)
parent, RICHARD PENKOSKI; and)
RICHARD PENKOSKI, as the parent and)
legal guardian of B. A. P.,)
Plaintiffs,)
v.) Case No. 2:20-cv-65
OVERTON COUNTY BOARD OF) Chief Judge Waverly Crenshaw Jr.
EDUCATION,) Magistrate Alistair Newbern
(JURY DEMAND)
Defendant.)

**PLAINTIFFS' MEMORANDUM SUPPORTING
MOTION FOR LEAVE TO FILE AMENDED COMPLAINT**

Plaintiffs, B.A.P. and Richard Penkoski (hereinafter "Plaintiffs"), by and through undersigned counsel and pursuant to Rule 15 of the Federal Rules of Civil Procedure, respectfully request that this Court allow amendment of Plaintiffs' Complaint.

On April 15, 2021, the parties filed a Joint Motion to Extend Deadline for Amending Pleadings. Plaintiffs respectfully submit the proposed First Amended Complaint (hereinafter the "AC") attached to the accompanying Motion as Exhibit "1." The AC adds facts learned from discovery that support the allegations in the initial Complaint.

MEMORANDUM OF LAW

The Supreme Court of the United States held in *Foman v. Davis*, 371 U.S. 178, 182 (1962), that leave to amend is freely given. The purpose of a liberal amendment standard is to enable a party "to assert matters that were overlooked or were unknown . . . at the time . . . [of the] original complaint or answer." *Smiga v. Dean Witter Reynolds, Inc.*, 766 F.2d 698, 703 (2d Cir. 1985) (alterations in original) (citation omitted).

Plaintiffs filed their initial Complaint on October 16, 2020, alleging violations of freedom of speech, free exercise of religion, due process, and equal protection, and a violation of the Tennessee Religious Freedom Restoration Act (“TRFRA”). (Doc. 1).

On January 4, 2021, this Court held the Case Management Conference. On the same day – January 4, 2021 -- Plaintiffs served their Combined First Set of Interrogatories and Request for Production of Documents to Defendant Overton County Board of Education (the “BOE”). Counsel for the BOE requested an extension of time to serve responses. The BOE served its responses on February 22, 2021, which included production of over six hundred (600) pages of documents. Subsequent to the production on February 22, 2021, additional documents were served in the weeks after. Time was devoted to reviewing the discovery responses and also researching applicable comparisons to other similar cases based upon the theory suggested by the BOE’s discovery responses.

The discovery revealed, for the first time, that the BOE adopted a policy that delegated authority to administrators at each school to prepare and distribute student handbooks. The responses revealed, for the first time, that Richard Melton, the principal of Livingston Academy, drafted, and was responsible for the adoption and enforcement of, the school’s 2020-2021 student handbook, portions of which were enforced against Plaintiff B.A.P. The responses revealed that Melton is a decision-maker with respect to the content of the student handbook, its application to, and enforcement against, B.A.P., along with other BOE policies and practices.

The BOE’s discovery responses also revealed, for the first time, that Stephen Henson, the classroom teacher, removed Plaintiff B.A.P. from the classroom and sent her to the principal’s office for an alleged violation of the student handbook. Thus, Henson enforced the student handbook against B.A.P., along with other BOE policies and practices.

In light of these newly discovered facts, the undersigned contacted defense counsel on March 29, 2021, to discuss the status of the case. Based upon the conference, counsel sought a judicial settlement conference to mitigate litigation. After the parties requested a judicial settlement conference, this Court directed the parties to schedule a Mediation with retired Magistrate Judge Joe B. Brown. Upon securing a date for Mediation, on April 15, 2021, the parties filed a Joint Motion to Extend Deadline for Amending Pleadings (Doc. 23), which this Court granted on April 16, 2021, setting May 19, 2021, as the new deadline. (Doc. 24). The parties conducted the Mediation on May 12, 2021, which resulted in an impasse. Plaintiffs now seek leave to amend their Complaint.

The newly discovered information provided by the BOE establishes Livingston Academy principal Richard Melton as a decision-maker with respect to some of the challenged policies because he is responsible for drafting the student handbook. He is responsible for the adoption and enforcement of the student handbook based upon the authority the BOE's policies delegate to him. In addition, the newly discovered information establishes that Stephen Henson enforced the student handbook, including the provisions enforced against B.A.P. Accordingly, Plaintiffs seek to amend their Complaint to add Melton and Henson as defendants.

Sixth Circuit case law "manifests 'liberality in allowing amendments to a complaint.'"
Newberry v. Silverman, 789 F.3d 636, 645 (6th Cir. 2015) (quoting *Janikowski v. Bendix Corp.*, 823 F.2d 945, 951 (6th Cir. 1987)). Amending the Complaint will not result in unnecessary delay and will not prejudice the defendant or anyone else. *See Sec. Ins. Co. v. Kevin Tucker & Assocs., Inc.*, 64 F.3d 1001, 1009 (6th Cir. 1995); *Tefft v. Seward*, 689 F.2d 637, 639 n. 2 (6th Cir. 1982) ("Delay that is neither intended to harass nor causes any ascertainable prejudice is not a permissible reason, in and of itself, to disallow an amendment of a pleading").

The discovery period does not close until September 20, 2021. Dispositive motions are not due until October 29, 2021, and trial is set for May 10, 2022. Allowing amendment will not alter any deadline nor will it cause any prejudice. Plaintiffs' AC maintains the counts and allegations of the original complaint (with the exception of Count V under the TRFRA, which is dropped) based upon the same core of operative facts and adds two defendants and allegations based upon discovery in this case. The time to amend has not expired and no order prevents Plaintiffs from seeking to amend. Pursuant to LR 15.1, the entire First Amended Complaint is attached to the Motion as Exhibit 1.

In compliance with Local Rules, prior to filing this motion, Plaintiffs' counsel provided the First Amended Complaint with Exhibits 1 and 2 to counsel for BOE by electronic mail on Tuesday, May 18, 2021, at 9:55 am. Due to the one week of time between Mediation and the deadline to amend, counsel moved expeditiously to first submit the amendment to the clients for review. On Wednesday, May 19, 2021, Plaintiffs' counsel and counsel for BOE conferred by telephone regarding the amendment. At the time of the call, counsel for BOE had not been able to finalize a position on whether to consent or oppose.

WHEREFORE, Plaintiffs respectfully request that this Court grant the requested amendment and direct that the attached First Amended Complaint be entered and grant any further relief this Court deems is equitable and just.

Respectfully submitted this 19th day of May, 2021.

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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing has been forwarded via the court's ECF/CM system to:

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on this the 19th day of May, 2021.

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